



**Andrew & Steve Advocates v Paragon Electronics Limited; Jepchirchir
(Contemnor) (Environment and Land Miscellaneous Application
94 of 2019) [2024] KEELC 6382 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 94 OF 2019
LN MBUGUA, J
SEPTEMBER 26, 2024**

BETWEEN

ANDREW & STEVE ADVOCATES ADVOCATE

AND

PARAGON ELECTRONICS LIMITED CLIENT

AND

KIRWA NOELE JEPCHIRCHIR CONTEMNOR

RULING

1. There are 2 applications for determination in the matter. The 1st one is the Advocate’s application dated 20.10.2023 seeking that the Client’s bill of costs dated 3.7.2023 be dismissed for being res judicata, that the orders to apply to ELC Misc. App No. 95 of 2019 and No. 96 of 2019 and that costs be provided for.
2. The application is based on grounds on its face and on the supporting affidavit sworn on 20.10.2023 by Mutiso Steve Kimathi, who avers that the advocate instituted the proceedings herein by way of an advocate-client bill of costs dated 29.5.2019 against the client seeking costs of ksh. 1,036,998.32 for representing the client in ELC No. 1205 of 2015. That the said bill was taxed in favour of the advocate at ksh. 770,233.80 on 29.10.2020.
3. That similarly, the advocate herein instituted ELC Misc. App. No. 95 of 2019 by way of an Advocate-Client Bill of costs dated 29.5.2019 seeking costs of ksh.1,166,389.50 for representing the client herein in ELC No. 215 of 2017 and the bill was taxed at ksh.858,910.70 in favour of the advocate vide the ruling of 29.10.2020.



4. That the Advocate also instituted ELC Misc. App. No. 96 of 2019 by way of an advocate-client bill of costs dated 29.5.2019 seeking costs of ksh.468,909.694 for representing the client in ELC No. 178 of 2017 and the bill was taxed in favour of the advocate at ksh.239,975.76.
5. That subsequently, the client filed references challenging the 3 decisions of the taxing master and in the meantime, engaged the advocate in negotiations in a bid to settle the matter out of court. That the parties managed to record consents dated 19.4.2021 to the effect that all the 3 related matters be marked as fully settled with no orders as to costs. However, the advocate filed an application dated 19.10.2021 to expunge the said consents on grounds that the client was in contravention of the spirit of negotiations, but the said application was dismissed by this court on 9.2.2022.
6. That the client subsequently filed a party and party bill of costs dated 5.5.2022 pursuant to the costs awarded in the ruling of 9.2.2022 wherein they sought costs of ksh. 330,364.80 but the same was dismissed by the taxing master on 26.1.2023. The client had also filed similar bills dated 5.5.2022 in ELC Misc. App. No. 95 of 2019 seeking ksh. 325,565.80 and in ELC Misc. App. No. 96 of 2019 seeking ksh. 235,822.40 which were all dismissed.
7. He avers that on the basis of respective determinations issued in the 3 matters, the current party and party bills of costs all dated 3.7.2023 and filed in the 3 related matters herein are res judicata pursuant to Section 7 of the *Civil Procedure Act* and they are afterthoughts by the client maliciously intended to drag the advocate in endless litigation.
8. That in addition, this Hon. Court became functus officio in all 3 matters on the issue of costs awarded in the ruling of 9.10.2022.
9. The application is opposed by the client vide grounds of objection dated 6.5.2024. It contends that the application is supported by an unlawfully commissioned affidavit, that it does not disclose grounds of res judicata and that there is a clear difference between the subject matter in the client's present bill of costs dated 3.7.2023 and the client's earlier bill of costs dated 5.5.2022.
10. The 2nd application is the Client's Notice of Motion application dated 23.11.2023. It seeks orders that Kirwa Noele Jepchirchir be summoned to appear before this court to show cause why she should not be punished for practicing without a license and that she be committed to civil jail for a period not exceeding 6 months.
11. Additionally, it seeks orders that the Advocate's supporting affidavit sworn on 20.10.2023 in support of the application dated 20.10.2023 be struck out for being commissioned by an unlicensed advocate as well as orders that the orders herein to apply in ELC Misc. App No. 95 of 2019 and No. 96 of 2019. The client also seeks costs of the application on full indemnity basis.
12. The application is premised on grounds on its face and on the supporting affidavit sworn on 23.11.2023 by Valentine Ataka, advocate on record for the Client. She avers that the Advocate's supporting affidavit sworn on 20.10.2023 in support of the Advocate's application dated 20.10.2023 is commissioned by Kirwa Noele Jepchirchir an advocate not certified to practice law.
13. The application is opposed by Kirwa Noele Jepchirchir vide her replying affidavit sworn on 3.4. 2024. She avers that she was admitted to the bar on 31.3.2016 and has been in private practice until 13.4.2023 when she was appointed as a state counsel and is entitled to non-practicing allowance thus she does not take out a practicing certificate.
14. That prior to her appointment, she had practiced in various law firms and upheld the dignity of the profession. She avers that she is a stranger to the firm of Mutiso & Steve Advocates, and that the signature appearing on the affidavit sworn on 20.10.2023 is not hers. She avers that it is rampant for



anyone to get an advocate's data from the LSK Portal and make stamps for trade without an advocate's knowledge.

15. The application is also opposed by the Advocate vide the replying affidavit sworn on 8.2.2024 by Mutiso Steve Kimathi, the managing partner of the advocate's firm. He avers that if an advocate practices without a certificate, they would be cited for professional misconduct and not contempt of court as the client has done. That at the time of swearing the supporting affidavit dated 20.10.2023 in question, he had no reason to doubt that Noelle Kirwa Jepchirchir had not taken out a practicing certificate.
16. He argues that once appointed as a commissioner for oaths as the said Jepchirchir was on 1.4.2020, and in the absence of the commission being revoked by the chief Justice, nothing stops a duly appointed commissioner for oaths from exercising the powers granted under Section 4 of the [Oaths and Statutory Declaration Act](#).
17. He also contends that Section 10 of the [Advocates Act](#) exempts certain officers including those in the Office of the Attorney General from taking out practicing certificates. He urges the court to be guided by Article 159 of [Constitution](#) to disregard technicality alleged by the client.
18. The two applications were canvassed vide written submissions. The Advocate's submissions are dated 27.6.2024. It is submitted that documents /pleadings filed by an advocate who does not possess a current practicing certificate do not become invalid. The case of [Peterson Ndung'u Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani v Kenya Power & Lighting Company LTD](#) [2018] eKLR, [Department of Agriculture and Food Authority v George & 4 others](#) [2021] eKLR, [Jamii Bora Bank Limited v Ernest & Young LLP](#) [2017] eKLR as well as the case of [Kenya Women Finance Trust v Salome Waitbaka Kinyua & another](#) [2019] eKLR are cited.
19. It is submitted that the alleged contemnor's actions would constitute professional misconduct and as such, the Disciplinary Tribunal established under Section 57 of the [Advocates Act](#) is clothed with jurisdiction to hear the issues raised herein.
20. On the prayer that the client's bill of costs be declared to be res-judicata, the advocate urges the court to issue the orders sought on the strength of Section 7 of the [Civil Procedure Act](#). It relies on the case of [Nicholas Njeru v Attorney General & 8 others](#) [2013] eKLR, [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#) [2017] eKLR as well as the case of [Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another](#) [2016] eKLR.
21. The client's submissions are dated 6.5.2024. It is submitted that the replying affidavit of Steve Kimathi amounts to hearsay and that the exemption from taking out practicing certificates under Section 10 of the [Advocates Act](#) is not intended to enable private practice while serving at the office of the Attorney General. It is the client's submission that an advocate remains a commissioner for oaths only as long as she continues holding a practicing license. The case of [Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 Others](#) [2018] eKLR is cited.
22. The case of [Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 others](#) [2013] eKLR is cited to submit that the court should not countenance an illegality or sanitize it at the altar of Article 159 (2) (d) of the [Constitution](#) and that this court has residual power to punish Kirwa Noele Jepchirchir under Section 56 of the [Advocates Act](#).
23. It is submitted that given the defect in the advocates application dated 20.10.2023, the Advocates application is incurably defective and should be struck off.



24. The client also reiterates that res judicata does not arise as the subject matter in the bill of costs dated 5.5.2022 was the Advocates Bill of costs dated 29.5. 2019 while the subject matter of the current bill is the application dated 19.10.2021.
25. I have considered all the arguments raised herein. The issues falling for determination are; whether an affidavit commissioned by an advocate without a current practicing certificate is invalid and whether the Bill of costs dated 3.7.2023 is res judicata.
26. The 2 applications for determination herein were triggered by the Client’s Bill of costs dated 3.7.2023. The Advocate contends in its Notice of motion dated 20.10.2023 that the said bill is res judicata. His supporting affidavit to the said motion sworn on 20.20.2023 was commissioned by one Kirwa Noele Jepchirchir whom the client wants punished and her affidavit struck out.
27. It is in public domain that in recent times, the Law society of Kenya has been dealing with a pandemic of persons masquerading as Advocates and has tried to weed them out in a bid to uphold the integrity and professionalism of the legal profession.
28. It is therefore disheartening that Advocates who are officers of the court are perpetuating conduct that the Law Society is fighting. There is no doubt that Kirwa Noele Jepchirchir is an Advocate of the High Court of Kenya admitted in the year 2016. She did not take out a practicing certificate for the year 2023 and on 13.4.2023, she was appointed state counsel in the Office of the Attorney General.
29. The affidavit she is said to have commissioned is dated 20.10. 2023. She denies signing it and contends that her stamp may have been illegally used. By who? Mr. Mutiso Steve Kimathi could not explain how the affidavit in issue was commissioned by a state counsel.
30. In *National Bank of Kenya Ltd v Wilson Ndolo Ayab* [2009] eKLR, the court of Appeal stated as follows when dealing with documents drawn by an advocate who had not taken out a practicing certificate;
- “It is public policy that courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates we come to the conclusion that will discourage excuses being given for justifying the illegality. A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal Act. For that reason alone the charge and instrument of guarantee in this matter are invalid, and we so hold.”
31. The above case is distinguishable from the instant matter in that in the former case, the unqualified advocate had drawn a charge and a guarantee. In the instant matter, the advocate in question has commissioned an affidavit drawn by a qualified advocate and she has denied doing so and there is proof she was not in practice at the time her stamp was used.
32. Courts views on whether an affidavit such as the one in the matter should be invalidated have taken 2 divergent school of thoughts as the authorities relied on by rival parties will tell.
33. I’m persuaded by the school of thought that the issues concerning advocates are separate issues that do not go to the substance of the suit. To this end, the court is persuaded by the case of *Kyalo Komu v Felix Maliti Mulingata* [2021] eKLR where it was held that;
- “In the light of the above decisions, and the dictates of the Article 159 2 (d) of *Constitution* of Kenya, it is the position of this court that non-compliance of an advocate in taking out his practicing certificate, is a separate issue to be dealt with against the concerned advocate



which may include and not be limited to disciplinary action against that advocate. But the same does not go into the root or substance of proceedings filed by such advocates”

34. Thus on the same breadth, I find that the issue of Kirwa Noele Jepchirchir commissioning an affidavit does not go to the substance of the suit, and I therefore decline to expunge the document in question.
35. On whether the clients bill of costs dated 3.7.2023 is res judicata, the client argues that there is a clear difference between the subject matter in the client’s present bill of costs dated 3.7.2023 and the client’s earlier bill of costs dated 5.5.2022.
36. The court has considered the contents of both bills in issue. For the bill of costs dated 5.5.2022, whose ruling was issued by the court on 26.1.2023, it is the finding of this court that the said party and party bill of costs also included the instructions pertaining to the Advocate’s application dated 19.10.2021 whose ruling was delivered on 9.2.2022 and which forms the subject matter of the bill of costs dated 3.7.2023. Items 47-51 of the bill dated 5.5.2022 relate to the application dated 19.10.2021!. The client has himself to blame for mixing issues as noted in the Deputy Registrars ruling of 26.1.2023.
37. Be that as it may, the court notes that it did award the client the costs of the application dated 19.10.2019. In order to put these matters to rest, noting that the court had even closed the 3 files on 9.2.2022, the court proceeds to give the following orders;
 1. The two applications dated 20.10.2023 and 23.11.2023 are hereby dismissed with no orders as to costs.
 2. The client’s costs awarded in the ruling of 9.2.2022 for the application dated 19.10.2019 are hereby assessed at the sum of Ksh.60,000 as a lump sum in Misc App. 94 of 2019 Only, thus no sums shall cascade to the other two files.
 3. All the three files ELC Misc. App No. 94, 95 and 96 of 2019 are hereby marked as closed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ochieng holding brief for Mr. Ataka for Client

Mabango holding brief for Kimathi for the Advocate

Court assistant: Joan

